FILE COPY

Office-Supreme Court, U.S.
FILED
APR 10 1965
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 843

PAUL V. CASE, Petitioner,

V.

STATE OF NEBRASKA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE RESPONDENT

CLARENCE A. H. MEYER
Attorney General
State of Nebraska
MELVIN KENT KAMMERLOHR
Assistant Attorney General
Department of Justice
State Capitol Building
Lincoln, Nebraska
Counsel for Respondent.

JOE CHRISTENSEN, INC., 1521 O Street, Lincoln, Nebraska

INDEX

SUBJECT INDEX

	Page
Brief for the Respondent	
Constitutional and Statutory Provisions Involved	1
Question Presented	1
Argument	2
I. If the State Fails to Provide a Postconviction Remedy, Habeas Corpus in Federal Court is Available	2
II. The Sanction Contended for by Petitioner of Discharging the Petitioner Without an Evidentiary Hearing of His Factual Claims if the State Court Fails or Cannot Provide a Remedy Solves Absolutely Nothing	7
A. The Sanction Contended For By Petitioner Contravenes the Respect and Independence of the States	11
III. The Limited Jurisdiction Stated by the Nebraska Supreme Court in Habeas Corpus Does Not Differentiate Between Federal and State Rights	13
Conclusion	14
Appendix A	17
Legislative Bill 836, Legislature of Nebraska	17
Article I, Section 11, Constitution of the State of Nebraska	19

CITATIONS

Cases:

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469	3, 11
Carlsen v. State, 129 Neb. 84, 261 N. W. 339	8
Case v. State, 177 Neb. 404, 129 N. W. 2d 107	5, 14
Dowd v. U. S., 340 U. S. 206, 95 L. Ed. 215	10

Page

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837 12
Gideon v. Wainright, 372 U. S. 335 ..... 6, 16
Hawk v. Olson, 326 U. S. 271, 90 L. Ed. 61 2
Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561 8
Henry v. State of Mississippi, 379 U. S. 443, 85 S. Ct. 564 ..... 5, 7, 16
Jennings v. Illinois, 342 U. S. 104, 96 L. Ed. 119 ..... 4, 5, 7, 10
Johnson v. Zerbst, 304 U. S. 458 6
Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483 9
Testa v. Katt, 330 U. S. 386 ..... 13, 14
Woods v. Nierstheimer, 328 U. S. 211 7
Young v. Ragen, 337 U. S. 235, 93 L. Ed. 1333 ..... 2, 3, 4

Constitutions:

Article I, Section 11, Constitution of the State of Nebraska 14, 19

Statutes:

United States Code, Title 28 § 2254 3
Nebraska Revised Statutes, 1943: § 25-21,149 8
Reissue Revised Statutes of Nebraska, 1943: Reissue of 1964, Chapter 25 9

In The

Supreme Court of the United States

October Term, 1964

No. 843

PAUL V. CASE, Petitioner,

V.

STATE OF NEBRASKA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes set forth by petitioner, other pertinent provisions are set forth in Appendix A.

QUESTION PRESENTED

1. Whether this court will require a state to provide some means whereby a prisoner can be heard on his claim that he is confined in violation of his consti-

tutional rights with the sanction of discharging the prisoner from custody without an evidentiary hearing if the state does not or is unable to comply.

ARGUMENT

I.

If the State Fails to Provide A Post-Conviction Remedy, Habeas Corpus in Federal Court Is Available.

In *Hawk* v. *Olson*, 326 U. S. 271, 90 L. Ed. 61, the Supreme Court of the United States reversed and remanded to the Supreme Court of Nebraska stating that the petitioner was entitled to an opportunity to prove his allegations of violations of the Fourteenth Amendment of the United States Constitution at his trial. The court did not state in what way the Nebraska court was to accomplish this, if it were, or what the enforcement would be from the United States Supreme Court; however, in the opinion this court did state:

> "* * * * *
>
> "* * *. When the state does not provide corrective judicial process, the Federal courts will entertain habeas corpus to redress the violation of the Federal constitutional right. White v. Ragen, 324 U.S. 760, 89 L. Ed. 932, 65 S. Ct. 978. * * *.
>
> "* * * * *"

This court long after *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333, has recognized that many states do not provide adequate postconviction remedies for claimed denial of federal constitutional rights; however, this court thus far has, even after *Young* v. *Ragen*, 337 U. S. 235, determined that this fact goes to the exhaustion of the petitioner's state remedies entitling him to

an earlier habeas corpus appearance in federal district court. Thus in *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, decided February 9, 1953, three and one-half years after *Young* v. *Ragen*, 337 U. S. 235, in discussing the question of exhaustion of state remedies, the court notes that in the legislative history of 28 U. S. C., Section 2254, that this problem was inherent in the amendment; the court stated at 344 U. S. 449:

"* * * * *

"When, in April 1948, Judge Maris presented the Judicial Conference draft of § 2254 to the Senate Judiciary Subcommittee, the language of the revision of 28 USC, on which the hearings were being held, set out three bases for exercise of federal jurisdiction over applications for habeas corpus from state prisoners. Under the language of the bill as it then read, an application might have been entertained where it appeared (1) that the applicant had exhausted the remedies available in the courts of the state, or (2) *where there was no adequate remedy available in such courts*, or (3) where such courts had denied the applicant a fair adjudication of the legality of his detention under the Constitution and laws of the United States. In accepting the recommendation of the Judicial Conference, the Congress eliminated the third basis of jurisdiction. S Rep No. 1559, p 9, shows the reason for this as follows:

" 'The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a "fair adjudication of the legality of his detention under the Constitution and laws of the United States." The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it

would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies *or if he had no adequate State remedy.*

"'* * * * *.'" (Emphasis supplied.)

The majority further stated at 344 U. S. 458:

"* * * * *.

"* * *. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, *unless no state remedy for the deprivation of federal constitutional rights ever existed.* Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A.L.R. 406; Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448. * * *.

"* * * * *." (Emphasis supplied.)

A year and a half after *Young* v. *Ragen,* 337 U. S. 235, this court again considered the postconviction remedy situation in Illinois in *Jennings* v. *Illinois,* 342 U. S. 104, 96 L. Ed. 119, decided December 3, 1951. In the interim between the two cases Illinois passed the Illinois postconviction hearing act. In *Jennings* the petitioners claimed however that they were held in custody in violation of the federal Constitution and that even under the new act there was no state remedy presently available to them. This court, considered it appropriate that the Illinois Supreme Court be per-

mitted to provide the answer, on remand, whether petitioners' claims could be determined under the Illinois postconviction hearing act or whether or not that act did not provide an appropriate state remedy. Accordingly the court vacated the judgments below and held that if the Illinois Supreme Court determined that there was no Illinois remedy for determination of petitioners' claims that petitioners may proceed without more in the United States District Court.

There is no reason for the court to do otherwise in this case than it did in *Jennings* v. *Illinois*, 342 U. S. 104, except it may be doubted that any need exists for determination by the Nebraska Supreme Court that there is no remedy available since it is clear from the opinion below, *Case* v. *State*, 177 Neb. 404, 129 N. W. 2d 107, that there is no remedy available to petitioner under Nebraska law. (Except possibly by legislation now pending, Appendix A.) Petitioner however claims that *Jennings* v. *Illinois*, 342 U. S. 104, should no longer be followed because of the congestion in the federal courts and to reduce the friction in state and federal relations. There are undoubtedly a number of things which Congress could do to ease the court congestion problem and so far as the friction in federal-state relations, it is nothing now compared to what it would be should this court take the step petitioner asks of it.

The case of *Henry* v. *State of Mississippi*, 379 U. S. 443, 85 S. Ct. 564, decided January 18, 1965, cited by petitioner is clearly distinguishable from the present situation. That case was a direct review on certiorari to the Supreme Court of Mississippi in which this court remanded the case to the state court to determine the question of whether the petitioner had waived his right

to object to certain testimony. However, even in that case, the court specifically pointed out that in remanding the court did not even remotely imply that the state must forego its procedural requirements if it did not find there had been a waiver but on the contrary, that such a finding would only mean that the petitioner could then go into federal court. This, of course, as we have argued elsewhere in the brief, is the proper solution open to this petitioner who may go into federal court on his claim, he having exhausted his state's remedies, except that no remand to the state courts of Nebraska would be necessary in the instant case as it is demonstrated no remedy is presently available, unless the legislation pending in the Nebraska Legislature hereinafter referred to, fills this gap. (See Appendix A).

Petitioner also suggests that under *Johnson* v. *Zerbst*, 304 U. S. 458, and *Gideon* v. *Wainright*, 372 U. S. 335, a court loses its jurisdiction due to the failure to comply with the constitutional right to counsel; that since this goes to the jurisdiction of the court that it is actually within the pronouncements of the Nebraska court as to its remedy of habeas corpus and since this proposition has not been presented to the Nebraska court the petitioner apparently contends that this matter should be remanded to the Nebraska court for its reconsideration in the light of the proposition that the trial court lost jurisdiction if it denied the right to counsel thus making habeas corpus available. We feel that this consideration was undoubtedly considered by the Supreme Court of Nebraska in its treatment of the case below wherein it considered a number of this court's decisions relating to the right to counsel, including *Gideon* v. *Wainright*, 372 U. S. 335. Our pri-

mary objection to the petitioner's request in this regard, however, does not so much involve the remand as the sanction he suggests as discussed under point II; and as stated earlier we can see no valid or logical reason for not permitting the petitioner to go into federal court if the state fails or cannot give him a remedy even under this situation the same as was made available in *Henry* v. *Mississippi*, 379 U. S. 443, *Jennings* v. *Illinois*, 342 U. S. 104, *Woods* v. *Nierstheimer*, 328 U. S. 211, and numerous other cases.

II.

The Sanction Contended for by Petitioner of Discharging the Petitioner Wtihout an Evidentiary Hearing of His Factual Claims if the State Court Fails or Cannot Provide A Remedy Solves Absolutely Nothing.

What is petitioner actually asking this court to do? On page 38 of his brief he states that this court should reverse or vacate the judgment and remand the case to the Nebraska Supreme Court for further proceedings at which time the Nebraska court could reconsider its position on the scope of habeas corpus in the light of this court's decision. However, the Nebraska Supreme Court, in the case below, has clearly stated at 177 Neb. 404 at 414 that it has no jurisdiction in this case in a habeas corpus proceeding. It further made it clear that this jurisdiction rested upon the Legislature and not upon the court, stating:

"* * * * *

"The statute, section 29-2801, R. R. S. 1943, authorizing the writ of habeas corpus and the decisions of this court construing the jurisdiction of courts in such cases hitherto discussed remains unchanged. The Legislature has not seen fit by

amendment to enlarge the powers of the courts of this state with respect to such writs. Neither should this court do so by judicial legislation. Postconviction procedure is properly one for the Legislature to consider. * * *.

"* * * * *"

From this we can safely assume that the Nebraska Supreme Court has foreclosed itself from this route.

Petitioner than states that the Nebraska Supreme Court could change its position on coram nobis. However, the Nebraska Supreme Court has consistently held that the writ of error coram nobis exists only to bring into the record facts which were unknown to the defendant at the time of his trial through no lack of reasonable diligence. This certainly would not fit the facts of this case. The holdings of the Nebraska Supreme Court are so well established in this field that we may also safely assume that the court could not follow this procedure. *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, *Hawk* v. *State*, 151 Neb. 717, 39 N. W. 2d 561. Petitioner admits this in his brief commencing at page 15, point 2.

Lastly he suggests that the Nebraska court could grant relief under the declaratory judgment act, Nebraska Revised Statutes, 1943 Section 25-21,149. In this regard the Supreme Court of Nebraska has held, in an action for a declaratory judgment wherein the question had been litigated by the parties in a civil action in another court having jurisdiction from which there was no appeal that:

"* * * * *

"* * *. The act does not extend beyond the controversies to which it was intended to apply. An

examination of precedents in which its purposes have been discussed shows that courts have a reasonable discretion in determining the controversies to which it applies. It was not intended as a substitute for new trial or appeal; or as a method of destroying a proper exercise of power in a former action; or as authority for a second trial by the same parties on identical issues in different forums; or as justification for an unnecessary decision; *or as approval of collateral attacks on former adjudications.* * * *.

"* * * * *." (Emphasis supplied.) (*Phelps County* v. *City of Holdrege*, 133 Neb. 139, 274 N. W. 483.)

In this regard it should be mentioned that the declaratory judgment act is contained in Reissue Revised Statutes of Nebraska 1943, Reissue of 1964, Chapter 25, entitled "Courts, District; Civil Procedure." Again, petitioner concedes in his brief on page 19 that declaratory actions are not usually considered part of the criminal process in any jurisdiction and that it is certain that the Nebraska courts would not view a declaratory action as appropriate.

Petitioner then goes on to ask this court to require the Nebraska Supreme Court to follow one of the foregoing three remedies, each of which has clearly been foreclosed by the Nebraska Supreme Court and which petitioner concedes are unavailable; that if the Nebraska court should fail to comply with a mandate requiring corrective process, petitioner could return to this court on a fresh petition for certiorari at which time this court could order petitioner's discharge from custody. This, states petitioner, is the ultimate sanction behind the due process requirement of state cor-

rective process. *Dowd* v. *U. S.*, 340 U. S. 206, 95 L. Ed. 215, cited by petitioner, is no authority for the drastic sanction contended for by petitioner insomuch as in that case the federal district court had granted an evidentiary hearing and had found the petitioner's constitutional rights had been violated; the case was in this court following that finding, coming up on certiorari to the United States Court of Appeals.

The suggestion of petitioner solves nothing. He is in effect asking this court to require the Nebraska courts to hear petitioner's claim in any one of three ways, which he concedes the Nebraska courts have already foreclosed, or in the alternative to discharge the petitioner. Stated more succinctly he is asking this court to discharge the petitioner without any evidentiary hearing even in the federal district court since it is clear there is no procedure for an evidentiary hearing in the state courts.

So what petitioner is asking this court to do is to display its authority over the state courts or to punish the state courts for not having a remedy. This is clear from the sanction he requests, because discharging the petitioner without an evidentiary hearing fails completely to get at the root of the case—which is—was petitioner denied the right to counsel in violation of the Federal Constitution? Discharging the petitioner without a hearing on this question overlooks completely the reason for this case. It becomes clear then that the procedure followed by this court in *Jennings* v. *Illinois*, 342 U. S. 104, 96 L. Ed. 119, is the only logical way to get at the question—let him proceed directly to federal court because his state remedies have been exhausted. To ask this court to discharge petitioner

without an evidentiary hearing if the state court fails to provide on remand that which it is conceded by petitioner the state court cannot provide, is in reality asking for a show of authority or retribution on the state court—even if the latter were intended we question that the state court would be the principal sufferer.

A. The Sanction Contended For By Petitioner Contravenes The Respect And Independence Of The States.

The Honorable Mr. Justice Jackson concurring in *Brown* v. *Allen*, 344 U. S. 443, not only recognized that the states do not all grant postconviction remedies for matters which could have properly been raised on appeal but stated that the jurisdiction of the state in this regard should be respected by federal courts. Said Justice Jackson at 344 U. S. 541:

"* * * * *

"The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. *A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.*

"* * * * *." (Emphasis supplied.)

The importance of recognizing the independence of the states in their legislative and judicial departments was recognized and again asserted in the recent land-

mark case of *Fay* v. *Noia*, 372 U. S. 391, 9 L. Ed. 2d 837, by the Honorable Mr. Justice Harlan with whom Mr. Justice Clark and Mr. Justice Stewart joined in dissenting. In discussing the determination of the adequacy and independence of state procedural grounds in refusing to consider a federal claim the Honorable Justice Harlan reviewed previous landmark decisions of this court stating at page 466 of 372 U. S.:

"* * * * *

"But determination of the adequacy and independence of the state ground, I submit, marks the constitutional limit of our power in this sphere. The reason why this is so was perhaps most articulately expressed in a different but closely related context by Mr. Justice Field in his opinion in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 401, 37 L. Ed. 772, 786, 13 S. Ct. 914. He stated, in a passage quoted with approval by the Court in the historic decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 78, 79, 82 L. Ed. 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487:

"'[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'

"For this Court to go beyond the adequacy of the state ground and to review and determine the correctness of that ground on its merits would, in our hypothetical case, be to assume full control

> over a State's procedures for the administration of its own criminal justice. This is and must be beyond our power if the federal system is to exist in substance as well as form. The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders.
>
> "* * * * *"

A similar interest of the state is clearly present in the situation here presented where the state has a strong legitimate interest in the finality of its judgments and wherein the Legislature of the people had not at the time of this decision authorized the courts to take jurisdiction of claimed invasions which could have been raised at the trial, on motion for new trial, or on appeal.

The sanction contended for by petitioner not only disregards this basic independence of the states, but also completely ignores the ultimate issues presented by his original petition.

III.

The Limited Jurisdiction Stated By the Nebraska Supreme Court in Habeas Corpus Does Not Differentiate Between Federal and State Rights.

Even in *Testa* v. *Katt*, 330 U. S. 386, before holding that the state court must enforce a valid federal claim, this court looked to the local law of Rhode Island to determine if the court had adequate jurisdiction to handle such cases, 330 U. S. at 394. The court there

found that Rhode Island was able to adjudicate similar state claims and therefore could not discriminate against the federal claim. However, such is not the case here as demonstrated by the limited jurisdiction in habeas corpus in Nebraska. Article I, Section 11 of the Constitution of the State of Nebraska provides in part as follows:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; * * *."

It is clear from the opinion of the court below, *Case* v. *State,* 177 Neb. 404 at 412, and previous opinions of the State Supreme Court discussing the jurisdiction in habeas corpus in Nebraska that a denial of this provision of the State Constitution would not be available in Nebraska in habeas corpus; there is thus no discrimination between the state and federal law in this regard, habeas corpus simply does not apply when the trial court had jurisdiction of the offense and of the person charged and the sentence was within the power of the court. This, as alluded to earlier, is far different from the situation in *Testa* v. *Katt,* 330 U.S. 386, in which the state court had adequate and appropriate jurisdiction under local law to adjudicate the same type of action as was presented in the federal law.

CONCLUSION

We feel that it would be a waste of this court's time to discuss further the cases cited by petitioner in an attempt to draw distinctions which would be of doubtful value since this court undoubtedly has the power to do what petitioner requests should it decide to do so.

The real question in the case comes down to whether or not this court will require the states to enlarge their jurisdiction in regard to postconviction remedy on threat of discharge of a petitioner without an evidentiary hearing. This is a broad issue involving future ramifications in state-federal relations; it is a step down a definite path which requires philosophical considerations perhaps more than legal ones. It undoubtedly involves a step which, once taken, may become a touchstone for further curtailment of state independence by future courts.

The State of Nebraska as well as other states have a legitimate interest in determining that at some point a judgment of conviction must reach finality. The people of Nebraska through its elected Legislature has up until the time of this case decided that this point in time should be when the time for appeal has become final, except in the limited cases available in habeas corpus and coram nobis discussed herein.

Congress on the other hand has decided that habeas corpus should still be allowed in a broader spectrum even after the time for appeal has passed, but in the federal court system. This is its prerogative and protects the rights of a petitioner.

But the jurisdiction of the state courts, in keeping with the philosophy of our republic, should be established by the people of the state and not by the Congress or the United States courts.

What is cause and what is effect is often a debatable question. The congestion of habeas corpus cases in the federal courts is undoubtedly the result in part of

states not providing a suitable remedy; but this congestion could not have taken place if Congress had not provided the remedy in the first instance. Since Congress has properly seen fit to provide habeas corpus in the federal court system it may also properly take a number of steps to alleviate the congestion problem.

There is absolutely nothing to be gained in adopting the sanction petitioner suggests if the Nebraska courts are unable to provide a remedy, either by re-examination of habeas corpus in the light of *Gideon* v. *Wainright*, 372 U. S. 335, or by use of the postconviction remedy legislation now pending. Petitioner should, in such case, as in the many cases in the past including the recent case of *Henry* v. *Mississippi*, 379 U. S. 443, be then entitled to go to federal district court for an evidentiary hearing; instead of destroying federal-state relations by the sanction petitioner suggests, this procedure, in the words of the majority in *Henry* v. *Mississippi*, 379 U. S. 443, 85 S. Ct. 564 at 570, would "serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations."

Respectfully submitted,

CLARENCE A. H. MEYER
Attorney General
State of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General
Department of Justice
State Capitol Building
Lincoln, Nebraska

APPENDIX A

Legislative Bill 836 is in the final stages of passing through Nebraska's Unicameral Legislature, it having been voted on favorable twice by the entire legislative body at the time of printing of this brief. The text of this bill is at this time as follows:

A BILL

FOR AN ACT relating to criminal procedure; to provide a postconviction procedure; to provide that the procedure shall be cumulative; to provide for appointment of attorneys as prescribed; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence.

Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States,

the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of this act shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

Sec. 2. An order sustaining or overruling a motion filed under the provisions of this act shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided*, that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal.

Sec. 3. The remedy provided by this act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of this act which states facts which is true would constitute grounds for relief under another remedy shall be dismissed without prejudice.

Sec. 4. The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29-1803, Reissue Revised Statutes of Nebraska, 1943.

Sec. 5. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

(Legislative Journal, Nebraska Legislature, Sixty-fourth Day, April 2, 1965, p. 1032.)

Article I, Section 11, Nebraska Constitution provides as follows:

> Rights of accused. In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.

On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Per Curiam.

Petitioner sought a writ of habeas corpus in the District Court for Lancaster County, Nebraska, alleging that he was unconstitutionally denied the assistance of counsel when he entered a plea of guilty in that court to a charge of burglary. The trial court dismissed the petition without a hearing, and filed no opinion. The Nebraska Supreme Court affirmed. 177 Neb. 404, 129 N. W. 2d 107. The Supreme Court's opinion recognized that petitioner's allegations, if true, would establish a violation of the Federal Constitution. 177 Neb., at 410, 129 N. W. 2d, at 111. The Supreme Court held, however, that, in Nebraska, "Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." 177 Neb., at 412, 129 N. W. 2d, at 112. We granted certiorari, 379 U. S. 958, to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.

After certiorari was granted, the Nebraska legislature enacted a statute providing a postconviction procedure. Neb. Leg. Bill 836, Seventy-fifth Session, effective April 12, 1965. On its face, the statute provides for a hearing

of petitions such as this one, alleging denial of federal constitutional rights. Therefore, the judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.
} On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Mr. Justice Clark, concurring.

As the Court points out, we granted certiorari in this case "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Happily, Nebraska in the interim has adopted just such a procedure thus obviating the necessity of our passing upon the question.

It should be pointed out, however, that as early as 1949 this Court in *Young* v. *Ragen*, 337 U. S. 235, articulated the principle that the State must afford prisoners some "clearly defined method by which they may raise claims of denial of federal rights." 337 U. S. 235, 239. But compare *Mooney* v. *Holohan*, 294 U. S. 103 (1935). In stating that proposition the Court noted: "The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts . . . presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to [this] requirement . . . . Nevertheless, that requirement must be met." *Id.*, at 238–239.

Thereafter, the Illinois Post Conviction Hearing Act was adopted.[1] It was followed by passage of a statute in North Carolina in 1951 which was "modeled" on the Illinois Act.[2] *Miller* v. *State*, 237 N. C. 29, 51, 74 S. E.

[1] Ill. Rev. Stat., c. 38, §§ 122–1—122–7 (1963).

[2] N. C. Gen. Stat. §§ 15–217—15–222 (Supp. 1963).

2d 513, 528 (1953). Nebraska is the sixth State to adopt such a statute since *Young v. Ragen, supra.*[3] There exists in some States a wide variety of procedural techniques that have been used to deal with due process attacks on criminal convictions, *i. e.*, basic common-law remedies such as habeas corpus, *coram nobis* and delayed motions for new trial. But the great variations in the scope and availability of such remedies result in their being entirely inadequate.

As a consequence there has been a tremendous increase in habeas corpus applications in federal courts. Indeed, in the Supreme Court alone they have increased threefold in the last 15 years. This has brought about much public agitation and debate over proposed limitations of the habeas corpus jurisdiction of federal courts. The necessity for such proposals has been based on various grounds, including that of federal-state comity; inordinate delay in the administration of criminal justice in the state courts; and the heavy burden on the federal judiciary. None of these will survive careful scrutiny.

Strangely enough there has been little light thrown on the necessity for more effective post-conviction remedies in the States. In 1958 the Burton Committee [4] reported out a preliminary draft of findings in which it stated

> "that the law of state post-conviction process in many states was wholly inadequate to cope with the de-

---

[3] Maryland, Maine and Oregon have passed similar legislation. Md. Ann. Code, Art. 27, §§ 645–A to 645–J (Supp. 1964); Me. Rev. Stat. Ann., c. 126, § 1–A (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963). It should be noted, however, that four other States have adopted similar procedures by Rule of Court. See Alaska Sup. Ct. Rule 35 (b); Del. Super. Ct. (Crim. Proc.) Rule 35; Mo. Sup. Ct. Rule 27.26; N. J. Crim. Prac. Rules of Super. and County Cts., Rule 3:10 A–2.

[4] The late Mr. Justice Burton of revered memory was Chairman of the Committee on Post Conviction Remedies of the American Bar Association's Section of Judicial Administration. In August 1958 it

mands now being placed upon it. In some jurisdictions prisoners were altogether precluded from direct access to the courts. [*Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Dowd* v. *Cook*, 340 U. S. 206 (1951).] . . . In many more, the procedures recognized by state law failed to provide genuine opportunities for testing constitutional issues of the most numerous and important types. The result was that prisoners often failed to obtain hearings on their allegations in the state courts. This, in turn, increased the number of petitions in state and federal courts and was generally productive of frustrations in all persons concerned with the process." At pp. 2–3.

Believing that the practical answer to the problem is the enactment by the several States of post-conviction remedy statutes I applaud the action of Nebraska. This will enable prisoners to "air out" their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts. This has proven true in Illinois where it is reported that federal applications from state prisoners dropped considerably after its Act was adopted. I understand that the Illinois Legislature is now considering the enlargement of the five-year limitations period of its present Act to a 20-year period. The consensus is that this will solve the problem entirely in Illinois, which was originally the "sore spot" of the Nation in this regard.

I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine and Oregon in providing this modern procedure for testing federal claims in the state courts and thus relieve the federal courts of this ever-increasing burden.

---

circulated a preliminary draft of a study entitled Effective State Post-Conviction Procedures—Their Nature and Essentialities, which was prepared by the Seminar in Criminal Procedure of the University of Chicago Law School under the direction of Professor Francis A. Allen.

SUPREME COURT OF THE UNITED STATES

No. 843.—October Term, 1964.

Paul V. Case, Petitioner,
v.
State of Nebraska.
} On Writ of Certiorari to the Supreme Court of Nebraska.

[May 24, 1965.]

Mr. Justice Brennan, concurring.

The petitioner entered his plea of guilty on April 18, 1963, one month after this Court's decision in *Gideon* v. *Wainwright*, 372 U. S. 335, holding the Sixth Amendment guarantee of counsel applicable to state prosecutions by virtue of the Fourteenth Amendment.[1] The Nebraska Supreme Court followed prior Nebraska decisions in holding that, in a habeas corpus action brought by a convicted prisoner, judicial inquiry is limited to the jurisdiction of the convicting court over the offense and over the person of the accused, and to the question whether the sentence

[1] The petition for habeas corpus reads:

"Petitioner, Paul Vernon CASE, was sentenced to five (5) years in the Nebraska Penal and Correctional Complex on May 3, 1963, A. D.

"Petitioner was 'fast talked' and forcibly coerced into waiving his rights (U. S. Constitutional Rights) to have advice and counsel; to have a Preliminary Hearing, and to plead not-guilty.

"Mr. William D. Blue told Petitioner he, Petitioner, would be charged with being 'An Habitual Criminal' if he did not waive these rights. He, Petitioner was held in Solitary Confinement in City Jail, until such time as he would agree—under cruel and unusual circumstances.

"The basic rights waived by this Petitioner are guaranteed him under the Sixth Amendment of the U. S. Constitution and are so fundamental and essential to a fair trial that they are made obligatory upon the States, *All* states, by way of the Fourteenth Amendment. For reference see Gideon vs. Wainwright in the U. S. Supreme Court. October 1962, Term, No. 155; all Justices concurring."

imposed was within the power of the court.[2] The State conceded in its response to the petition for certiorari that habeas corpus was unavailable to hear petitioner's claim and that petitioner had no other remedy in the state courts.[3]

On oral argument, counsel appointed for petitioner, see 379 U. S. 995, conceded the relevancy of the new Nebraska postconviction procedure,[4] but contended that petitioner

[2] See *Jackson* v. *Olson*, 146 Neb. 885, 893–894, 22 N. W. 2d 124, 129–130; *In re Application of Dunn*, 150 Neb. 669, 35 N. W. 2d 673; *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. 2d 181, rev'd 326 U. S. 271, on remand, 146 Neb. 875, 22 N. W. 2d 136.

[3] The response stated: "For all practical purposes, there is no collateral remedy available in the Nebraska courts to a state prisoner who alleges that a violation of his federal constitutional rights occurred in connection with his conviction and whose claim has not yet been considered by the state courts, unless the prisoner's claim is predicated upon a lack of jurisdiction of the sentencing court over the offense or over the person of the accused."

In addition to this concession that the State provided no remedy whatever, petitioner cites *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, as authority for the unavailability of *coram nobis*; Neb. Rev. Stat. § 29–2103 (1964 Reissue), as barring a motion for a new trial; and Neb. Rev. Stat. § 25–1912 (1964 Reissue), as barring an appeal.

[4] The new statute, Neb. Leg. Bill 836, 75th Session, effective April 12, 1965, provides:

"Section 1. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the ri s of the prisoner as to render the judgment void or voidable

was nevertheless entitled to a declaration that he had been unconstitutionally denied a hearing by the Nebraska courts, and to a reversal of the judgment of the Nebraska Supreme Court and a mandate directing that by some procedure the petitioner's claim be adequately adjudicated.[5]

---

under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of this act shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

"A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

"Sec. 2. An order sustaining or overruling a motion filed under the provisions of this act shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided*, that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal.

"Sec. 3. The remedy provided by this act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of this act which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice.

"Sec. 4. The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29–1803, Reissue Revised Statutes of Nebraska, 1943."

[5] The petitioner states in his brief:

"At this stage of the litigation the Court need not pass on the steps to be taken if the Nebraska court should fail to comply with a mandate requiring corrective process for petitioner. It might be suggested, however, that the problem essentially is no different from actual or potential disobedience of the mandate in many other cases remanded by this Court. If on the remand Nebraska failed to make

Petitioner concedes that the Court's practice has been to remit prisoners to their federal habeas remedy. See, *e. g.*, *Jennings* v. *Illinois*, 342 U. S. 104. But he contends that substituting federal for state corrective process, instead of directing the State itself to meet its obligation, is a disservice to sound principles of federalism.[6] He points

---

corrective process available, petitioner could return here with a fresh petition for certiorari. This Court could then order petitioner's discharge from custody. That is the ultimate sanction behind the due process requirement of state corrective process. See *Dowd* v. *Cook*, 340 U. S. 206, 209–10."

In support of this contention, the petitioner argues that the Supremacy Clause and the fundamental Fourteenth Amendment right to a hearing constitutionally require the States to afford corrective judicial process to remedy federal constitutional defects in their criminal prosecutions, citing *Frank* v. *Mangum*, 237 U. S. 309, 335; *Moore* v. *Dempsey*, 261 U. S. 86, 91; *Mooney* v. *Holohan*, 294 U. S. 103, 113; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 690; *Carter* v. *Illinois*, 329 U. S. 173, 175–176; *Foster* v. *Illinois*, 332 U. S. 134, 139; *Taylor* v. *Alabama*, 335 U. S. 252, 272 (concurring opinion); *Young* v. *Ragen*, 337 U. S. 235, 238–239. In addition to the cases cited involving criminal convictions, petitioner cites as other applications of the general principle *General Oil Co.* v. *Crain*, 209 U. S. 211, 228; *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Ward* v. *Love County*, 253 U. S. 17; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230; *Testa* v. *Katt*, 330 U. S. 386. He also argues that, since Nebraska allowed habeas corpus to attack convictions for jurisdictional defects based on Nebraska law, the Nebraska Supreme Court unconstitutionally discriminated against federal law by refusing habeas corpus for jurisdictional defects based on the Fourteenth Amendment. For the proposition that a State may not discriminate against rights arising under federal laws, petitioner cites *McKnett* v. *St. Louis & S. F. R. Co.*, *supra*, and *Testa* v. *Katt*, *supra*, and for the proposition that an unconstitutional denial of counsel is a jurisdictional defect relies on *Johnson* v. *Zerbst*, 304 U. S. 458.

[6] Petitioner refers to *Young* v. *Ragen*, *supra*, where, in vacating the denial of state habeas corpus, the Court said: "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case." 337 U. S., at 239. He also cites *Jackson* v. *Denno*, 378 U. S. 368;

to the vast increase in the number of federal habeas applications by state prisoners as evidence that lack of adequate state procedures has put an intolerable strain on the federal writ and has brought about mounting friction between state and federal courts. See *Henry* v. *Mississippi*, *supra*, 379 U. S., at 453. In short, he contends that if the evolution in the coverage of the Fourteenth Amendment and in the scope of federal habeas corpus, see *Fay* v. *Noia*, 372 U. S. 391; is not to pull the federal judiciary increasingly into state criminal administration, the States must provide broader procedures more hospitable to federal constitutional claims.

The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well.[7] If, by effective corrective processes,

---

Boles v. *Stevenson*, 379 U. S. 43; *Henry* v. *Mississippi*, 379 U. S. 443; and Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Col. L. Rev. 1143 (1953).

[7] Dean Griswold of the Harvard Law School, in an address, "The States and Criminal Law," given on May 13, 1965, to the Cleveland Bar Association, said:

"For, after all, the basic responsibility for the enforcement of the criminal law remains with the States. The States are, or should be, as much concerned with high standards as is the Federal government. The States should, in my view, welcome the determinations of the Supreme Court that the high standards prescribed by our Federal Constitution are to be taken seriously and should be enforced. What is needed now is for the States to accept this responsibility, and to adopt means to carry it out. With proper explanation and understanding, this can, I believe, be done without impairing our enforce-

the States assumed this burden, the exhaustion requirement of 28 U. S. C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. See *Townsend* v. *Sain*, 372 U. S. 293, 312–318. Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of *Townsend* v. *Sain* were met, prove unnecessary.

None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce,[8]

---

ment of the criminal law. When the States do fully meet this responsibility, we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government."

[8] The Uniform Post-Conviction Procedure Act, 9B Uniform Laws Ann. 352–359, designed to provide adjudication of federal claims, has had but slight influence in the States. Arkansas adopted the Uniform Act in 1957, but repealed it two years later. 2 Acts of Arkansas (1959) 1161. Five States have adopted their own statutes. Ill. Rev. Stat., c. 38, §§ 122–1 to 122–7 (1963); Me. Rev. Stat. Ann., c. 126, §§ 1–A to 1–G; Md. Ann. Code, Art. 27, §§ 645A to 645J (Supp. 1964); N. C. Gen. Stat. §§ 15–217 to 15–222 (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963). Procedures have been adopted by rule of court in four States. Alaska Crim. Rule 35 (b); Del. Superior Court Rules of Crim. Proc., Rule 35 (a); Mo. Rules of the Supreme Court, Rule 27.26; N. J. Crim. Practice of Superior and County Courts, Rule 3:10A–2. Some state courts are apparently broadening existing postconviction remedies by judicial construction. See, *e. g.*, *Rice* v. *Davis*, 366 S. W. 2d 153 (Ky. 1963); *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State ex rel. Banach* v. *Boles*, 131 S. E. 2d 722, 728 (W. Va. 1963); *Hunt* v. *Warden*, 335 F. 2d 936, 941–942 (C. A. 4th Cir.) (discussing the

were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure. The 1954 Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices pointed the way in urging that "State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statutes," and recommending provisions for hearing, a record, fact findings and conclusions of law. H. R. Rep. No. 1293, 85th Cong., 2d Sess., p. 7 *et seq.*

These are similar to other suggestions of desirable attributes of a state postconviction procedure which should reduce the necessity for exercise of federal habeas corpus jurisdiction.[9] The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia*, *supra*, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas* v. *Alabama*, 380 U. S. 415, 422–423; *Henry* v.

---

expanding Maryland remedy). See also the views expressed in *People* v. *Wilson*, 18 App. Div. 2d 424, 430, 239 N. Y. S. 2d 900, 906; *Ex parte Aaron*, 275 Ala. 377, 381–382, 155 So. 2d 334, 337–338 (dissenting opinion); *Donnell* v. *Nash*, 323 F. 2d 850 (C. A. 8th Cir.); *Cobb* v. *Balkcom*, 339 F. 2d 95, 100 (C. A. 5th Cir.). Proposals that the States make their postconviction procedures coextensive with federal habeas corpus are found in Meador, Accommodating State Criminal Procedure and Federal Postconviction Review, 50 A. B. A. J. 928 (1964); National Assn. of Atty. Gen., Conference Proceedings, 1964, pp. 42–43 (remarks of Arthur J. Sills, Atty. Gen. of New Jersey), 149–150 (resolution of the Association); Brennan, Some Aspects of Federalism, 39 N. Y. U. L. Rev. 945, 957–959 (1964).

[9] See Meador, *supra*, 50 A. B. A. J., at 929–930; Brennan, *supra*, 39 N. Y. U. L. Rev., at 958–959; cf. Report No. 23, ABA Section of Criminal Law, Mid-Winter Meeting, Feb. 1965, p. 7.

Mississippi, supra. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. *Townsend* v. *Sain, supra.* It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners' claims.

But there is no occasion in this case to decide whether due process requires the States to provide corrective process. The new statute on its face is plainly an adequate corrective process. Every consideration of federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.